



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

May 19, 2020 Government Records Council Meeting

Lynn Petrovich
Complainant

Complaint No. 2019-226

v.

Township of Ocean (Monmouth)
Custodian of Record

At the May 19, 2020 public meeting, the Government Records Council (“Council”) considered the May 12, 2020 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to provide a completed Statement of Information to the Government Records Council, despite more than one request and an extension of time, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).
2. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
3. The GRC must conduct an *in camera* review of the sixteen (16) e-mails to determine the validity of the Custodian’s purported assertion that they were exempt in part or whole under the attorney-client privilege or other asserted exemptions. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
4. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 4 above), nine (9) copies of those e-mails**

that were redacted, a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 19th Day of May 2020

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 20, 2020

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 19, 2020 Council Meeting**

**Lynn Petrovich¹
Complainant**

GRC Complaint No. 2019-226

v.

**Township of Ocean (Monmouth)²
Custodial Agency**

Records Relevant to Complaint:

OPRA Request No. 1: Electronic copies via e-mail of the following regarding “Ocean Glades Condominium”:

1. “Lis Pendens” and/or summonses and complaints in foreclosure action served upon prior owners.
2. Deed transferring ownership to the Township of Ocean (“Ocean”).

OPRA Request No. 2: Electronic copies via e-mail of the following regarding “Ocean Glades Condominium”:

1. Resolution authorizing award to Groundwater & Environmental Services, Inc. (“GES”).
2. All e-mails to and from the Mayor and Council.
3. Estimated cost to remediate the current environmental regulations for construction.
4. Statement from financial officer as to GES’ availability of funds.

Custodian of Record: Vincent Buttiglieri

Request Received by Custodian: September 3, 2019

Response Made by Custodian: October 8, 2019

GRC Complaint Received: November 8, 2019

Background³

Request and Response:

On September 3, 2019, the Complainant submitted two (2) Open Public Records Act

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

(“OPRA”) requests to the Custodian seeking the above-mentioned records. On October 8, 2019, the Complainant purportedly⁴ e-mailed the Custodian seeking a status update. On October 8, 2019, the twenty fifth (25th) business day after receipt of the OPRA request, the Custodian purportedly⁵ responded in writing stating that he was on vacation and would address the subject OPRA requests upon his return.

Denial of Access Complaint:

On November 8, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that she submitted two (2) OPRA requests on September 3, 2019. The Complainant asserted that on October 8, 2019, she e-mailed the Custodian asking “for a response.” The Complainant asserted that the Custodian responded stating that he was on vacation and would address the OPRA requests upon his return. The Complainant stated that on November 5, 2019, after not receiving a response, she called the Custodian and left a message regarding the subject OPRA requests. The Complainant stated that to date, she received no response from the Custodian.

Statement of Information:

On December 13, 2019, the GRC requested a completed Statement of Information (“SOI”) from the Custodian.

Additional Submissions:

On December 23, 2019, the Complainant e-mailed the GRC noting that following this complaint, the Custodian allowed her to come to the Township and review several records. The Complainant stated that based on her inspection, which occurred on December 16, 2019, the following records were still outstanding:

1. E-mails to and from the Mayor and Council regarding “Ocean Glades Condominium.
2. Estimated cost to remediate the current environmental regulations for construction.
3. Statement from financial officer as to GES’ availability of funds.
4. Any the consulting agreements with GES, as noted in an August 29, 2019 legal notice.

Statement of Information (cont’d):

On December 30, 2019, the GRC resent the request for a completed SOI to the Custodian, noting that it received a delay “undeliverable” receipt. The GRC stated that the SOI deadline was extended to January 7, 2020. On January 10, 2020, the GRC resent the request for a completed SOI to the Custodian via facsimile due to another delayed “undeliverable” receipt. The GRC stated that the SOI deadline was extended to January 17, 2020.

⁴ The Complainant referenced this correspondence in her Denial of Access Complaint but did not provide a copy as part of her filing.

⁵ Ibid.

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On January 17, 2020, the Custodian e-mailed the GRC requesting an extension of time through January 24, 2020. The Custodian noted that he previously believed all responsive records were disclosed. The Custodian noted that it appeared he was mistaken and was attempting to provide additional records to the Complainant. On the same day, the GRC granted an extension through January 24, 2020.

On January 22, 2020, the Custodian e-mailed the GRC stating that the Complainant informed him that she would be withdrawing this complaint. The Custodian asked, in the interest of “eliminat[ing]” a need to file the SOI, whether the GRC received a withdrawal notice. On the same day, the GRC stated that it had not received a notice.

Additional Submissions (cont’d):

On January 24, 2020, the Complainant e-mailed the GRC advising that she was communicating via telephone with the Custodian all week. The Complainant stated that based on those conversations, she received additional records on January 22, 2020. The Complainant noted that she had yet to review the records, but that she “[felt] certain it contains copies of the requested records.” On the same day, the GRC requested that the Complainant advise whether she wished to withdraw the instant complaint.

Statement of Information (con’t):

On February 28, 2020, the GRC sent a “No Defense” letter to the Custodian, requesting a completed SOI within three (3) business days of receipt. The GRC also noted that “given that significant time has passed since [it] last attempted to receive an SOI from the [Custodian], no additional extensions” would be permitted.

Additional Submissions (cont’d):

On March 6, 2020, the Complainant notified the GRC that she was in receipt of the e-mails sought in the subject OPRA request. The Complainant noted that these e-mails were the last outstanding portion of her OPRA requests. On the same day, the GRC requested that the Complainant advise whether she wished to withdraw the instant complaint. On March 13, 2020, the GRC again requested that the Complainant advise whether she wished to withdraw the instant complaint. On May 4, 2020, the GRC e-mailed the Complainant confirming receipt of a voicemail wherein she asserted additional issues based on the Custodian’s most recent disclosure. The GRC stated that should the Complainant wish to include those issues on the record, she must do so in writing by May 7, 2020.

On May 7, 2020, the Complainant e-mailed the GRC stating that she took issue with sixteen (16) e-mails that the Custodian either denied in part or whole.

The Complainant stated that the Custodian denied access, in whole, to e-mail Nos. 4, 5, 6, 8, 9, 13, 16, 18, 19, and 22 under the attorney-client privilege exemption. The Complainant further stated that the Custodian redacted e-mail Nos. 1, 15, 28, and 30 also under the attorney-client privilege. The Complainant contended that at least eight (8) of the e-mails include Mary Beth Lonergan, who is not a Township official but “a principal at a private firm.” The Complainant

further asserted that she did not believe Ms. Lonergan was an attorney. Additionally, the Complainant noted that another e-mail included Greg Fehrenbach, who is identified as associated with Ocean Glades Condominium but that it was unclear why he had standing under the attorney-client privilege. The Complainant thus contended that each e-mail should be disclosed to her in total.

The Complainant finally stated that the Custodian also denied access, in whole, to e-mail Nos. 25 and 26 as “Confidential” and citing N.J.S.A. 47:1A-1. The Complainant noted that she reviewed N.J.S.A. 47:1A-1 and found that it addressed personal privacy. The Complainant asserted that her OPRA request did not seek personal information; thus, the Custodian should disclose these e-mails to her.

Analysis

Failure to Submit SOI

OPRA also provides that “Custodians shall submit a completed and signed statement of information (SOI) form to the Council and the complainant simultaneously that details the custodians' position for each complaint filed with the Council[.]” N.J.A.C. 5:105-2.4(a).

OPRA further provides that:

Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five business days from the date of receipt of the SOI form from the Council's staff . . . Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.

[N.J.A.C. 5:105-2.4(f).]

Finally, OPRA provides that “[a] custodian’s failure to submit a completed and signed SOI . . . may result in the Council’s issuing a decision in favor of the complainant.” N.J.A.C. 5:105-2.4(g). In Alterman, Esq. v. Sussex Cnty. Sheriff’s Office, GRC Complaint No. 2013-353 (September 2014), the custodian failed to provide a completed SOI to the GRC within the allotted deadline. Thus, the Council noted the custodian’s failure to adhere to N.J.A.C. 5:105-2.4(a). See also Kovacs v. Irvington Police Dep’t (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).

In the instant matter, and after several technological issues, the GRC was able to successfully transmit an SOI request to the Custodian via facsimile on January 10, 2020. Thereafter, the Custodian sought an extension through January 24, 2020 to submit an SOI, which the GRC granted. On January 22, 2020, the Custodian e-mailed the GRC asking whether the Complainant withdrew this complaint thus “eliminat[ing]” the need to submit an SOI. On the same day, the GRC replied advising that the complaint was not withdrawn. The Complainant e-mailed the GRC on January 24, 2020 noting that the Custodian provided an additional response, she did not withdraw the complaint. Notwithstanding, the Custodian did not comply with the GRC’s request for an SOI.

Well after the expiration of the extended deadline, on February 28, 2020, the GRC again attempted to obtain a completed SOI from the Custodian by sending a “No Defense” letter and requesting a completed SOI within three (3) business days of receipt. This transmission also included a copy of the original SOI letter providing detailed instructions on how to properly submit an SOI. The GRC also noted that “given that significant time has passed since [it] last attempted to receive an SOI from the [Custodian], no additional extensions” would be permitted. The GRC received no response thereafter.

Accordingly, the Custodian’s failure to provide a completed SOI to the GRC, despite more than one request and an extension of time, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁶ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

The Complainant submitted her OPRA request to the Custodian on September 3, 2019. Thereafter, the Custodian did not respond until he purportedly e-mailed the Custodian on October 8, 2019, approximately twenty-five (25) business days after submission of the OPRA request. Further, in the absence of an SOI, the Custodian failed to identify the date he received the request. N.J.A.C. 5:105-2.4(f). Further, there is no evidence in the record to refute the twenty-five (25) business day delay in responding to the subject OPRA request.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a

⁶ A custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁷ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The court stated that:

[OPRA] also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

In the matter before the Council, the Complainant eventually received all records sought in response to her OPRA request. However, the Complainant e-mailed the GRC on May 7, 2020 taking issue with sixteen (16) e-mails the Custodian either withheld or disclosed with redactions. The Complainant noted that the Custodian based his exemptions on the attorney-client privilege, “N.J.S.A. 47:1A-1;” and general confidentiality.

Upon review of the evidence of record here, the GRC cannot determine whether the exemptions applied to the responsive e-mails constitute a lawful basis for denial. The GRC’s review of this issue is further complicated by the Custodian’s failure to submit an SOI. Thus, it is

⁷ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).
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evident that a “meaningful review” is necessary to determine whether all withheld and redacted e-mails reasonably fall within the attorney-client privilege or other cited exemptions as purportedly asserted by the Custodian. Thus, the GRC must review all sixteen (16) e-mails in order to determine the full applicability of these exemptions. Such an action is not uncommon, as the GRC will routinely perform an *in camera* review in similar circumstances. See e.g. Pouliot v. N.J. Dep’t of Educ., GRC Complaint No. 2015-281 (Interim Order dated January 31, 2017).

Therefore, the GRC must conduct an *in camera* review of the sixteen (16) e-mails to determine the validity of the Custodian’s purported assertion that they were exempt in part or whole under the attorney-client privilege or other asserted exemptions. N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super. at 346.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian’s failure to provide a completed Statement of Information to the Government Records Council, despite more than one request and an extension of time, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).
2. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
3. The GRC must conduct an *in camera* review of the sixteen (16) e-mails to determine the validity of the Custodian’s purported assertion that they were exempt in part or whole under the attorney-client privilege or other asserted exemptions. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

4. **The Custodian shall deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 4 above), nine (9) copies of those e-mails that were redacted, a document or redaction index⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,¹⁰ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

May 12, 2020

⁸ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

⁹ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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